



SHERIFFDOM OF TAYSIDE, CENTRAL AND FIFE

DNF-B175-20

JUDGMENT OF SHERIFF PRINCIPAL M LEWIS

in appeal by

██████████

Appellant

against

MENTAL HEALTH TRIBUNAL FOR SCOTLAND

Respondent

**Appellant:** ██████████  
**Respondent:** ██████████ **The Mental Health Tribunal For Scotland**

Perth, 31 August 2020

**Background**

1. ██████████ has a diagnosis of a chronic psychotic illness characterised by persecutory delusions and passivity. A Short Term Detention Certificate ("STDC") was granted on 05 August 2020 by an approved medical practitioner in terms of Section 44 of the Mental Health (Care and Treatment) (Scotland) Act 2003 ("The 2003 Act"). The STDC authorised detention of ██████████ in hospital for a period of 28 days to determine

what medical treatment should be given to her and to give such treatment in accordance with Part 16 of the 2003 Act.

2. On 06 August [REDACTED] applied under Section 50 of the 2003 Act to the Mental Health Tribunal for Scotland (“The Tribunal”) for revocation of the STDC because she did not accept that the statutory criteria required for the continuance of the STDC were met. The application was lodged on behalf of [REDACTED] by [REDACTED] [REDACTED], solicitor.
3. The application for revocation was heard by the Tribunal on 18 August. The Tribunal conducted the hearing by telephone conference call. [REDACTED] (in the presence of an escort nurse), her solicitor [REDACTED], the RMO [REDACTED], the MHO [REDACTED] [REDACTED], and an advocacy worker [REDACTED] participated. A trainee psychiatrist also joined the hearing but strictly as an observer.
4. The Tribunal heard evidence from [REDACTED] and [REDACTED]. [REDACTED] was given the opportunity, which he took, to pose questions to [REDACTED] and [REDACTED]. He also made a brief submission to the Tribunal towards the conclusion of the hearing.
5. The application was refused. [REDACTED] has challenged that decision and appealed to this court under Section 320(2) of the 2003 Act. An appeal to the Sheriff Principal may be made on one or more of the grounds set out in Section 324(2). The grounds are:
  - (a) The Tribunal decision was based on an error in law;

- (b) There has been a procedural impropriety in the conduct of any hearing by the Tribunal on the application;
- (c) The Tribunal has acted unreasonably in the exercise of its discretion;
- (d) The Tribunal's decision was not supported by the facts found to be established by the Tribunal.

Having considered the Note of Appeal, I have limited the appeal to ground (b) – procedural impropriety.

6. Given the current restrictions caused by the covid-19 pandemic and also in light of tight timescales, I appointed the appeal at short notice and instructed parties to lodge written submissions. I am grateful to [REDACTED] and also to [REDACTED] for submitting their written submissions and supporting material so promptly.

### **Submissions**

7. [REDACTED] elected to represent herself during the appeal. The essence of her submission is based on the circumstances in which the hearing was conducted. In short she says that the conduct of the hearing was unfair due to –
- Technical and practical difficulties which she experienced (interruptions from incoming phone calls, patient call alarms being activated and the voices of patients from elsewhere in the building).
  - Deterioration in the quality of the mobile phone facility (the speaker facility and the volume control caused difficulty).

- Lack of clarity about the process to be followed.
  - Being denied the opportunity to participate fully and effectively in the hearing and in particular to ask for portions of the inaudible evidence to be repeated.
8. [REDACTED] for the respondents invited me to refuse the appeal. She submitted that the overriding objective of Mental Health Tribunal for Scotland (Practice and Procedure) (No 2) Rules 2005 (“ the Rules”) is to secure that proceedings before the Tribunal are handled as fairly, expeditiously and as efficiently as possible. Rule 52(2)(c) provides that the Tribunal may hold a hearing and receive evidence by telephone, video link or by using any other method of communication if the Tribunal is satisfied that this would be fair in all the circumstances. In addition the appellant was informed from the outset that due to the covid-19 pandemic the hearing would take place by way of telephone conferencing facilities, and she did not object.
9. At the commencement of the hearing the convener explained the manner and order of proceedings and the procedure which the Tribunal proposed to adopt (paragraph 21 of the transcript). [REDACTED] produced a transcript of the hearing. The transcript reveals that there had been no unfairness or impropriety in the conduct of the hearing. The convener intervened appropriately to deal with background noise giving clear and careful instruction to all participants.
10. [REDACTED] was represented by a solicitor and also had used the services of an advocacy worker. Both participated in the hearing. She had a clear, practical and effective opportunity to participate in the hearing directly through the giving of

evidence and through the services of her solicitor (*MH v Mental Health Tribunal for Scotland* 2019 SC 527).

### **Decision**

11. I do not consider the argument regarding procedural impropriety as being established. Part One of Schedule 4 to the Coronavirus (Scotland) Act 2020 provides that any requirement physically to attend a court or tribunal does not apply unless the court or tribunal directs the person to attend physically in circumstances where that would (i) result in prejudice to the fairness of proceedings or (ii) otherwise be contrary to the interests of justice. On receipt of the application to revoke the detention certificate, ██████████ was notified that a hearing was scheduled to take place on 18 August 2020 at 2pm by way of telephone conference call. The notification expressly explains that the decision to convene the hearing by way of telephone conferencing facilities was directly attributable to the pandemic. ██████████ did not seek a physical hearing nor did she make any representation in advance of the hearing that the proposed format would result in procedural unfairness or otherwise be contrary to the interest of justice.

12. Access to the Tribunal is provided in the 2003 Act and the 2005 Rules. The Rules specifically provide that hearings can involve communication by telephone, by video link or by using any other method that is fair in all the circumstances (Rule 52(2)(c) and *JG v MHTS* GWD 22-502). The Lord President observed in the case of *MH v Mental Health Tribunal for Scotland* “In the modern era, where technology permits, hearings are regularly conducted remotely; whether by the decision maker being at a remote location or the party or witness being remotely linked. This can be

advantageous to everyone involved in terms of cost and time in certain circumstances. It may be a necessity in others, and that seems to have been the situation here.” In the current climate (covid-19 pandemic) the conduct of the hearing in relation to the revocation within very short timescales in my view was a necessity and the most practical and efficient means of doing so was by way of telephone conferencing.

13. In deciding that the hearing should proceed by way of telephone conference call the convener no doubt had regard to the overriding objective of ensuring that the proceedings were handled fairly, expeditiously and efficiently having regard to the urgency and seriousness of the situation and the impact of the pandemic.

14. Having regard to the transcript of evidence, the convener required to intervene on four occasions:

- During opening observations made by [REDACTED] solicitor an alarm could be heard. The convener sought an explanation. [REDACTED] advised that the noise emanated from the office was a patient alarm call. She apologised for that interruption.
- The second interruption came during the evidence of [REDACTED] when the ward telephone could be heard ringing for a short period. The convener intimated that in fairness to [REDACTED] and all other participants that disruption through noise would be addressed by having pauses until the noise ceased.

- At the commencement of [REDACTED] evidence the convener asked her to turn the loudspeaker off because that was interfering with audibility. [REDACTED] [REDACTED] fully co-operated.
- [REDACTED] asked her solicitor to repeat one question which she said was inaudible. The question was repeated and [REDACTED] responded.

15. Doubtless the interruptions were irritating for all of the participants. The issue here is fairness. In that regard the following factors are of importance:

- All of the Tribunal members had considered the written material including the medical reports and the written statement provided by [REDACTED] in advance of the hearing.
- Although the parties are not physically in the same room they all had the opportunity to participate. The convener dealt with the interruptions swiftly, ensuring that the appellant could hear and be heard and was not denied the opportunity of effectively participating.
- [REDACTED] was legally represented at the hearing and her solicitor had the full opportunity which he took to present her case orally as had her advocacy worker in writing.
- The decision made was one with relatively short term effects.
- Whilst there may have been technical difficulties in the course of the hearing in relation to operating the loudspeaker and the volume control and there were the interruptions mentioned above the difficulties and interruptions

were *de minimis* and did not in my view materially impact on the proper conduct of the proceedings.

16. Accordingly I refuse the appeal.